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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

MYRA PAGE WIREN,

Petitioner,

against

SHUBERT THEATRE CORPORATION, *et al.*,

Respondents.

BRIEF FOR RESPONDENT PARAMOUNT PICTURES INC. (sued herein as Paramount Famous Lasky Corporation) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

AUSTIN C. KEOUGH,
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LOUIS PHILLIPS,
Of Counsel.

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On April 4, 1931, petitioner commenced this action to enjoin the respondents from presenting, producing or distributing the play or motion picture photoplay entitled "Death Takes a Holiday", upon the ground that said play was a plagiarism of the petitioner's work "Most". The suit was brought after the respondents' play had been publicly performed for more than a year, and six months after Paramount Famous Lasky Corporation (now Paramount Pictures Inc. and hereafter referred to as "Paramount") had purchased the motion picture rights thereto.

On July 7, 1933, the respondent made a motion in the United States District Court for the Southern District of New York to dismiss the bill of complaint upon the ground that it affirmatively appeared from a reading of the petitioner's work "Most" and her own English translation

of respondents' work, both of which were annexed to the complaint, that there was no plagiarism.

On August 24, 1933, the District Court (Goddard, *J.*) granted the respondents' motion to dismiss the complaint upon the grounds stated in a long and well-considered opinion (5 Fed. Supp. 358), and a decree thereon was entered on October 31, 1933.

On May 21, 1934, the decree was unanimously affirmed by the Circuit Court of Appeals for the Second Circuit (Manton, Swan and Chase, *CJJ.*), without opinion (70 F. (2d) 1023).

On October 8, 1934, the petitioner's application for a writ of certiorari was denied by this Court (293 U. S. 591). A rehearing of the petition was denied by this Court on November 5, 1934 (293 U. S. 631) (Record, pp. 17, 54-55).

The record thus establishes that the petitioner's suit is one in which neither the District Court, the Circuit Court of Appeals, nor the United States Supreme Court found any merit.

While the action was pending, receivers in equity were appointed for Paramount (Record, p. 51). The receivership proceedings were superseded by Paramount's adjudication as a bankrupt on March 14, 1933. Between that date and July 1, 1935, the affairs of Paramount were administered by Charles D. Hilles, Eugene W. Leake and Charles E. Richardson, as Trustees in Bankruptcy and as Trustees in Reorganization Proceedings under Section 77-B of the Bankruptcy Act. During this entire period, and while the case was decided by the District Court, affirmed by the Circuit Court and considered by this Court, said

Trustees were in active and complete charge of the business and affairs of Paramount (Record, pp. 29-30, 39-40).

The time for filing claims in the bankruptcy proceedings and the subsequent reorganization proceedings expired prior to June 17, 1935 (Record, p. 30), but the petitioner failed to file any claim therein (Record, p. 31).

Former Judge Manton was indicted on April 26, 1939. He was tried and convicted on June 3, 1939. The proceedings of the trial and the items of his misconduct were the subject of widespread comment in the newspapers. The judgment of conviction was affirmed by the Circuit Court of Appeals (*U. S.* v. *Manton, et al.*, 107 Fed. (2d) 834), December 4, 1939. Certiorari was denied by the United States Supreme Court (309 U. S. 664) on February 26, 1940 (Record, pp. 28, 56).

On April 20, 1942, petitioner served motion papers for a reargument of the appeal decided on May 21, 1934 by the Circuit Court of Appeals, alleging that Judge Manton was disqualified to hear the original appeal. The Circuit Court of Appeals (Swan, Clark and Frank, *CJJ.*) denied the motion upon the grounds set forth in an opinion which is made part of the Record herein (p. 2).

SUMMARY OF RESPONDENT PARAMOUNT'S ARGUMENT

1. The Circuit Court of Appeals properly held that the alleged disqualification of Judge Manton was not established and that Mr. Lasker's interest in Paramount was too remote to implicate Judge Manton.

2. There is no important question of Federal law involved, nor has the Circuit Court of Appeals departed from the accepted course of judicial proceedings.

3. The petitioner is guilty of laches, and the court properly found that her delay in making her application was not adequately explained.

4. Petitioner having failed to file a claim in the Paramount Reorganization Proceedings may now assert no further claim. She is enjoined by order of the District Court of the United States for the Southern District of New York from proceeding in this action.

POINT I.

THE CIRCUIT COURT OF APPEALS PROPERLY HELD THAT THE ALLEGED DISQUALIFICATION OF JUDGE MANTON WAS NOT ESTABLISHED AND THAT MR. LASKER'S INTEREST IN PARAMOUNT WAS TOO REMOTE TO IMPLICATE JUDGE MANTON.

Petitioner's sole ground for this application is set forth in Point I of her brief. Briefly it is that Judge Manton at the time he participated in the determination of the appeal of this case was indebted in the sum of $250,000 to one Albert D. Lasker. The petitioner claims that Mr. Lasker:

(a) was an important member of the Board of Directors of Paramount;

(b) owned Lord & Thomas, which handled the advertising for Paramount;

(c) was a substantial stockholder of Paramount; and

(d) in 1926 sold to Paramount his chain of Chicago theatres.

It is also claimed by the petitioner in vague fashion that one William J. Fallon, alleged to have been the agent of

Judge Manton, was the owner of a large theatre ticket agency known as "Tyson's", and that Judge Manton was indebted to the motion picture industry generally by reason of certain dealings with one Harry Warner. Neither Mr. Fallon nor Mr. Harry Warner is alleged to have had any connection with any of the respondents.

These are the tenuous links by which the petitioner seeks to establish a corrupt relationship between Judge Manton and the respondent Paramount.

Remoteness of Mr. Lasker's Interests In Paramount.

The answering affidavits of the respondent Paramount completely refute all of petitioner's claims that the affirmance by the Circuit Court of Appeals of Judge Goddard's decision dismissing the complaint was in any way influenced by Albert D. Lasker, or by any connection which Lasker might have had with Paramount.

The Circuit Court of Appeals properly denied petitioner's application for reargument of the appeal upon the ground that "Mr. Lasker's interest in Paramount was too remote to implicate Judge Manton". This finding is based upon the facts set forth in the respondent's affidavits establishing the following:

1. Mr. Lasker was elected a Director of Paramount on November 9, 1931 and resigned January 17, 1933. During that entire period he attended only one meeting held on March 18, 1932, apart from which he had nothing whatsoever to do with the affairs or the management of the corporation (Record, pp. 25-26, 32-33, 40).

Accordingly, the Circuit Court of Appeals properly found that Mr. Lasker "was not a Director of Paramount when this appeal was heard" (See Opinion, Record, p. 2).

Indeed, Mr. Lasker ceased to be a Director six months prior to respondent's motion to dismiss the complaint made on July 7, 1933.

2. Mr. Lasker owned 33 shares of the common stock of the respondent Paramount out of a total of three million shares issued and outstanding, according to the stock lists of April 4, 1932 and May 10, 1935 (Record, p. 39).

While the petitioner made vague charges that Mr. Lasker may have held a beneficial stock interest through other nominees, she failed to specify any such possible nominee other than Lord & Thomas. The lists of stockholders of Paramount as of record on March 6, 1931, April 4, 1932 and May 10, 1935 disclosed that Lord & Thomas was not a stockholder during that period (Record, pp. 51, 49-50).

3. It is not denied that the respondent Paramount was a client of the advertising firm of Lord & Thomas from June 29, 1932 to May 1, 1937. But this was the sole relationship between them (Record, pp. 25-26).

4. It is admitted that in 1926 the respondent Paramount acquired a large part of the common stock of Balaban & Katz Corporation, a subsidiary of Paramount operating theatres in Chicago (Record, p. 39). Whether any part of this stock was acquired from Mr. Lasker in 1926 certainly could have no bearing upon the alleged disqualification of Judge Manton in considering an appeal in the year 1934.

Mr. Lasker's Alleged Relationship With Judge Manton Not Connected With Paramount.

While it may be true that Judge Manton was heavily indebted to Mr. Lasker, of which Paramount is ignorant,

the petitioner failed to show that this relationship had any connection with Paramount or with the case on appeal.

The petitioner did not even show that Mr. Lasker had any knowledge of the pendency of this action. On the contrary, the record affirmatively establishes that neither Mr. Louis Phillips, the attorney in charge of this case from its inception, nor Mr. Austin C. Keough, the attorney of record and General Counsel for the respondent Paramount, ever discussed this case with Mr. Lasker. Mr. Phillips never met Mr. Lasker (Record, p. 25), and Mr. Keough never spoke to Mr. Lasker (Record, p. 32). Nor has petitioner attempted to show that Judge Manton had any knowledge of Mr. Lasker's alleged interests in Paramount.

The business and affairs of the respondent Paramount were being administered by Trustees in Bankruptcy when Judge Goddard granted the respondent's motion to dismiss the complaint and when his decision was affirmed by the Circuit Court of Appeals. Despite the recklessness of her charges, petitioner does not even dare to suggest any improper connection between Judge Manton and the Trustees or between Mr. Lasker and the Trustees.

Assuming, *arguendo,* that a corrupt relationship existed between Judge Manton and Mr. Lasker, the record is barren of any vestige of evidence that this relationship had any bearing on Judge Manton's participation in a decision affecting the estate in bankruptcy of Paramount.

The Circuit Court of Appeals properly ruled that the "disqualification must be directly connected with the case on appeal" (See Record, p. 2).

POINT II.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW INVOLVED, NOR HAS THE CIRCUIT COURT OF APPEALS DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS.

The Circuit Court of Appeals was fully justified in concluding that the appeal was heard "by a qualified court and was correctly decided". The issue presented was purely one of fact, namely, the alleged disqualification of Judge Manton to hear the appeal in this case by reason of his asserted indebtedness to Mr. Lasker. The Circuit Court of Appeals resolved this question of fact in favor of the respondent Paramount, holding that Mr. Lasker's interest was too remote to implicate Judge Manton. In doing so, it followed its prior rulings that disqualification in order to warrant reopening of a case must be directly connected with it.

The Circuit Court of Appeals considered the petitioner's application and denied it in the same fashion and for the same reasons that it has denied other applications of a similar nature. There has clearly been no departure from the accepted and usual course of judicial proceedings.

POINT III.

THE PETITIONER IS GUILTY OF LACHES, AND THE COURT PROPERLY FOUND THAT HER DELAY IN MAKING HER APPLICATION WAS NOT ADEQUATELY EXPLAINED.

For three full years after Judge Manton's widely publicized conviction, petitioner made no move to reopen the case. Her only explanation for this delay is given as fol-

lows: "The petitioner is the sister of the attorney herein and during her very long and serious illness he was prevented in many ways from giving his attention to this case" (Brief in support of Petition, p. 15).

Petitioner offers no explanation why it was necessary for her attorney, who is also her brother, to wait until there was hope for her recovery and improvement before the petition for reopening the appeal could be made, or why it was necessary to have petitioner's personal participation in such application. Certainly the petitioner's attorney, who has been in charge of this case from its inception in 1931, was in a position to move for a reopening within a short time after Judge Manton's conviction in 1939. In fact, all of the affidavits in support of the application for reopening made before the Circuit Court of Appeals were signed by him.

POINT IV.

PETITIONER HAVING FAILED TO FILE A CLAIM IN THE PARAMOUNT REORGANIZATION PROCEEDINGS MAY NOW ASSERT NO FURTHER CLAIM. SHE IS ENJOINED BY ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK FROM PROCEEDING IN THIS ACTION.

By various orders of the District Court for the Southern District of New York, all claims in the Reorganization Proceedings of the respondent Paramount were required to be filed prior to June 17, 1935 (Record, p. 30). It is uncontradicted that no claim was filed by the petitioner in the Reorganization Proceedings. She is therefore barred from now asserting any claim against the respondent Paramount.

Judge Coxe's order (to which the petitioner refers in her brief) entered in the Paramount receivership proceeding authorizing her to continue this action to final judgment, did not relieve the petitioner of the necessity of filing a claim based on such judgment in the subsequent Reorganization Proceedings. Said order obviously merely permitted the petitioner to liquidate her claim in the pending action rather than in the receivership proceedings. A judgment in the action in favor of the petitioner would merely have conferred upon the petitioner the status of a creditor whose claim was liquidated. But like all other creditors she was required by the various orders of the court in the Reorganization Proceedings to file her claim by a certain date or be barred from making any recovery thereon. Her failure to file such a claim barred her from participation in the Plan of Reorganization of Paramount and from asserting any claim thereafter against the estate.

Moreover, by order of the District Court of the Southern District of New York dated June 16, 1934, all creditors were enjoined from commencing or continuing any suits against Paramount. This order was further continued by an order of June 17, 1935, pursuant to which all of the assets of Paramount were turned over to it by the Trustees (Record, pp. 29-30). This injunction remains in full force and effect and bars the petitioner from proceeding further against the respondent Paramount.

WHEREFORE, it is respectfully submitted that the petition for *Writ of Certiorari* be denied, with costs.

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